



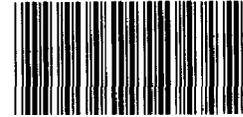
UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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GENERAL GOVERNMENT
DIVISION

March 15, 1983

B-210744



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The Honorable William H. Webster
Director, Federal Bureau of
Investigation

Dear Judge Webster:

Subject: Agreements Describing Liability in Undercover
Operations Should Limit the Government's
Liability (GAO/GGD-83-53)

As you know, we recently completed a review of the costs associated with the FBI's undercover operations. During that review we examined several agreements between the FBI and certain third parties which specified the conditions under which each would be liable for actions taken during an undercover operation. Usually these agreements stated that the Federal Government was liable only for the negligent acts of FBI employees, which it normally would be liable for under existing law. However, three of the eight agreements we reviewed expanded the scope of the Government's liability beyond FBI negligence. Supreme Court and Comptroller General decisions require that such agreements limit the amount of the Government's liability to available appropriations. One of the three agreements did not contain such a limit.

FBI officials told us that no costs have been incurred as a result of the agreement and none are anticipated. However, the potential liability under this or other similar agreements could generate unlimited costs to the Federal Government, if claims and lawsuits should occur.

FBI policies and procedures also require that agreements which expand the scope of the Government's liability should limit the amount of that liability. Because we did not pursue access to information which FBI officials considered sensitive, we could not evaluate these procedures in operation. FBI officials told us that they did not know why the one agreement omitted the liability limit. To ensure that this situation does

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not reflect any procedural flaw in the way such agreements are formulated, we suggest that you determine why the one agreement did not contain the required liability limit.

Additional details are provided below.

OBJECTIVES, SCOPE, AND METHODOLOGY

This study was part of a request we received from the Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives. We have issued the report on this request (GAO/GGD-83-51, Mar. 7, 1983), but it has not yet been released publicly. The Chairman requested that we determine, to the extent feasible, the total cost of FBI undercover operations, including litigation and settlement costs. He also asked us to determine the nature and extent of agreements describing liability in certain undercover operations. The information gathered to achieve this objective is the basis for this report. We interviewed FBI officials and obtained and reviewed various documents provided by them.

AGREEMENTS DESCRIBING LIABILITY ARE USED INFREQUENTLY

FBI officials told us that agreements describing the scope of each party's liability were entered into for only 7 of the 187 Class I (headquarters directed) undercover operations for fiscal years 1979 through 1981. They provided us copies of all seven and an additional agreement from a 1978 operation which was one of the first Class I operations. They said that these agreements were used primarily to ensure the participation of certain third parties in undercover operations. The formats of the agreements varied because they were tailored to each specific operation.

THREE AGREEMENTS EXPANDED THE SCOPE OF THE GOVERNMENT'S LIABILITY

Five of the eight agreements we reviewed stated that the Government would be liable for third-party losses resulting from FBI negligence. This is nothing more than the Government would normally be liable for under the Tort Claims Act (28 U.S.C 2671 et seq.). Two of the other three agreements were negotiated during the undercover operation and contain statements indemnifying the third party's losses whether or not these losses are due to FBI negligence. One of these two limits the amount of the Government's liability as required by Supreme Court and Comptroller General decisions, the other does not. The third agreement involved operation Frontload and was entered into

after the undercover operation was finished and several lawsuits had been filed. It advised a third-party corporation to implead the Government as a defendant, after which the Government would assume responsibility for the costs of litigation and settlement, absent improper or illegal conduct by the corporation's employees. It applied only to the lawsuits pending at the time of the agreement.

Pertinent sections of the two agreements which were negotiated during undercover operations are as follows:

- (1) "In consideration thereof, the FBI agrees to indemnify and hold harmless [the third party] from and against any and all liability, suit, losses, damages, and expenses * * * in the amount of \$500,000 for any damage or loss resulting to [the third party] as a result of [its] cooperation in this matter."
- (2) "The FBI agrees to indemnify [the third party] from any judgment, fine, assessment, or other expense, including attorneys' fees, of any litigation or proceeding in which damages or other relief are claimed by reason of acts by personnel of the FBI, the investigative nature of the venture, or the involvement or participation of the FBI therein."

The first agreement establishes a maximum liability limit of \$500,000 that the FBI will pay the third party for losses, damages, and other expenses. The second agreement appears to indemnify the third party for an indefinite amount of judgments and other expenses resulting from the investigation. This creates an unlimited contingent or potential liability that may become an actual liability in the event that losses occur. FBI officials told us that no payments have been made as a result of this agreement and none are anticipated.

The operation Frontload agreement is the only one under which the Government has made any payments. The agreement applied only to the lawsuits pending at the time of the agreement, which totalled about \$162.4 million. As of December 31, 1982, the Government had paid about \$1.1 million under this agreement, and pending lawsuits totalled about \$102.0 million.

ALL AGREEMENTS EXPANDING THE SCOPE
OF THE GOVERNMENT'S LIABILITY MUST
LIMIT THE AMOUNT OF LIABILITY

The Supreme Court and the Comptroller General have issued decisions which state that, absent express statutory authority

to the contrary, the Government may not enter into an agreement to indemnify where the amount of the Government's liability is indefinite or potentially unlimited. Such an agreement would violate the Antideficiency Act (31 U.S.C. 1341) because it can never be said that sufficient funds have been appropriated to cover the contingent liability. The Comptroller General has ruled that, for an agreement to comply with this act, the contingent liability must be limited to available appropriations. The limitation can be established in either of two ways:

- The agreement could simply state that the Government's liability to the third party is limited to a mutually agreed upon dollar amount which does not exceed available appropriations.
- The agreement could state that indemnity payments will not exceed appropriations available at the time of the third party's losses. Further, nothing in the agreement will imply that the Congress would appropriate additional funds to meet any deficiencies.

FBI policies and procedures also require that all requests for agreements be reviewed by FBI headquarters and meet several criteria, including that the agreements must have a finite liability. FBI officials told us they did not know why the one agreement omitted the liability limit.

CONCLUSIONS

All liability agreements should have finite limits. For no apparent reason, however, one agreement did not. Determining the reason this agreement did not contain the required liability limit could help avoid future recurrences of this situation.

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We appreciate the cooperation given our representatives during this review and welcome the opportunity to discuss these matters with you or your staff.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director